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No. 1047

In the
Supreme Court of the United States
OCTOBER TERM, 1967

THE NATIONAL INSIDER, INC.,
Petitioner,

vs.

BEST MEDIUM PUBLISHING CO., INC.,
Respondent.

PETITION FOR REHEARING ON DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Scheffer Press, Inc.—ANdover 3-6850

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To the Justices of the Supreme Court of the United States:

It is respectfully submitted that, in denying the petition for certiorari herein, on March 4, 1968, the Court has not fully realized the significance of the issues presented therein—the urgent necessity of a definitive determination of the rights conveyed by an author. Since filing the petition for certiorari and the reply to Respondent's brief, petitioner has become more fully aware of further information which shows how important and pervasive are the issues raised herein, not simply to petitioner, but to all authors and publishers.

The entire case boils down to one major issue of basic law which was not even passed upon by the Court of Appeals, although it was extensively briefed by both sides. Once again, petitioner is forced to set out this erroneous, baseless and mischievous rule as stated by the trial court:

> "The court concludes that where no conditions are stated at the time of the sale of an article, the law implies that there is a complete sale of the article and the publisher has full rights thereto.
>
> "It would seem to be the law as established by the treatises that where an author sells an article to a periodical without specification of the rights he is conveying that he transfers his entire right to the publisher who has the right to copyright thereon." (Supp. App. 3)

Since the various briefs were filed, petitioner has become aware of additional authority which shows that this conclusion is not true, in fact or in law. In the March 4, 1968 issue of *Publishers' Weekly,* the book trade journal, there is a discussion of the present case (p. 37). After summarizing the facts and decision in this case, the writers, Harriet F. Pilpel and Kenneth P. Norwick, experts on copyright problems and the publishing field, state:

> "Actually, it is not at all clear that the 'prevailng practice in the trade' is that when nothing is said, the author sells all rights, and it is for this reason, among others, that the *Insider* is at present asking the United States Supreme Court to review the case. Because of the obvious importance of the issues to so many people, it is hoped that the High Court will take the case and cast some further light on those issues."

Report No. 307 of the American Bar Association Committee on Copyright further shows that this issue is one which cannot be disposed of summarily by a reliance upon mere treatise writers without a full exploration of the ramifications of such a decision. That report states:

> "The committee next considered transfers of original manuscripts and other unpublished works. It was agreed that *absent any written agreement, such a naked conveyance should be presumed to transfer no rights in the copyright.* The more difficult problems, however, concern transactions involving the disposition of rights where an agreement exists which does not deal with all the rights comprised in a copyright. It is in this sphere that the conflicts between creators and users are most pronounced.
>
> * * *
>
> "Some specific problems which engaged the committee's attention were as follows:
>
> (1) Where the transaction obviously involves the grant of some rights to the user but the rights are not spelled out, what presumptions should apply? For example, where a manuscript is submitted to a magazine for purpose of publication and no contract or other agreement is executed, what specific rights shall the magazine be presumed to have obtained? Shall the user obtain only those rights it normally exercises (i.e., first serial rights), all publishing rights, or all rights of exploitation including non-publishing rights?" (emphasis supplied)

Thus, a committee of the American Bar Association composed of attorneys most vitally interested and most familiar with this field of law was not at all convinced that the problem was as easily solved as the District Court and Court of Appeals would have us believe.

It must be pointed out again, that not only did the District Court rely upon such erroneous presumption, but used it to override evidence of the custom in the industry which the trial judge himself had found persuasive. It is clear that this issue is one of great importance which should be decided by this Court. In a time where freedom of expression is particularly important, the opinion of the courts below, if allowed to stand, will serve only to repress and inhibit the free flow of ideas, in addition to impairing the protection afforded authors by the Constitution of the United States.

That this issue is one of great importance for many people connected with many areas of interest is illustrated by two letters received by petitioner's attorney.

On January 26, 1968, Walter J. Derenberg, secretary of the Copyright Society of America and a copyright authority of great reputation, wrote:

> "Many thanks for the copy of the petition for certiorari in the *National Insider Inc.* v. *Best Medium* case. I am very interested to have this for my records.
>
> * * *
>
> "Hope the Court will take the case; the decision should be reversed."

The Assistant General Counsel of the United States Information Agency wrote, on February 28, 1968:

> "*Because the issues involved* [in this case] *are of daily interest* for the Rights Clearance function of this office, I would greatly appreciate a copy of your Petition and Brief." (Emphasis supplied)

These letters, and others that could be cited, show the great importance placed upon the problems presented herein by those who are actually involved in this field on

a day-to-day basis. These problems are too important to be resolved by mere reference to treatise writers. Had these few uninformed treatise writers based their conclusions upon actual cases, actual custom and usage and other such circumstances, they might have been entitled to some consideration. This was obviously not the case. We have here a situation of such prime importance as to merit the intervention of this court in order to implement the constitutional rights of authors.

Petitioner therefore prays that this Court grant rehearing herein and that upon such rehearing the Petition for the Writ of Certiorari should be granted and the judgments below reversed.

Respectfully submitted,

ELMER GERTZ,
Attorney for Petitioner

CERTIFICATE OF ATTORNEY

I, Elmer Gertz, certify that I am the attorney for petitioner herein, National Insider, Inc.; that this petition for rehearing is presented in good faith and not for delay; and the petition is restricted to the above circumstances of substantial effect.

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ELMER GERTZ